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IN THE

Supreme Court of the United States

October Term, 1961

No. 948

NEDRICK YOUNG, ET AL.,
Petitioners,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Nedrick Young, Lester Cole, John Howard Lawson, Albert Maltz and Robert Richards, petitioners herein, pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that court entered January 18, 1962, which affirmed the action of the District Court denying petitioners' motion for a preliminary injunction.

Opinion Below

The opinion of the court below is officially reported at 299 F. 2d 119 and is set out in Appendix A, *infra*, at pp. 27-31. The District Court did not write or deliver an opinion.

Jurisdiction

The judgment of the court below was entered January 18, 1962 (R. 593). A petition for rehearing *en banc* (R. 594) was denied on February 15, 1962 (R. 605). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Where, because of petitioners' suspected Communist associations and beliefs, respondents initiated and maintained a concerted refusal to deal in petitioners' professional services as screenwriters, did the District Court have discretion to deny petitioners a preliminary injunction under Section 16 of the Clayton Act, 15 U. S. C. § 26, on the ground that respondents' action might be "reasonable"?

2. Where a motion for preliminary injunction is "heard" by the District Court some seven months after the action was commenced and, on review of a denial of that motion under 28 U. S. C. § 1292(a)(1), the issue of "clear error or abuse of discretion" turns on a question of law to be resolved in the light of the undisputed facts existing as of the date of the "hearing", could the Court of Appeals refuse to decide such law question on the ground that the action of the District Court did not constitute "clear error or abuse of discretion" in the light of the facts existing as of the date the action was commenced?

3 (a). Where findings were submitted to the District Court by prevailing counsel seven days *after* the record was filed in the Court of Appeals, while the District Judge was on vacation, but which he signed upon his return, forty-nine days after he denied petitioners' motion for preliminary injunction, was the Court of Appeals re-

quired either to (1) remand for proper findings or (2) review such findings uninhibited by the "clearly erroneous" rule set forth in Rule 52(a) of the Federal Rules of Civil Procedure?

(b). The Court of Appeals did not pass on the issue set forth in question 3(a). It ruled, instead, that the District Court's findings were made "in accordance with Fed. R. Civ. P. 52(b) * * *." Where a notice of appeal from an order denying a preliminary injunction was filed on July 28, 1961 and the entire original record was docketed in the Court of Appeals on August 28, 1961, did the District Court have jurisdiction thereafter to entertain a motion under Rule 52(b) of the Federal Rules of Civil Procedure or, in the absence of such motion, to make findings either under Rule 52(a) or Rule 52(b)?

Statutory Provisions and Rules Involved

The statutory provisions involved are Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, and Sections 1, 4, 6, and 16 of the Clayton Act, 38 Stat. 730, 731, 737 (15 U. S. C. §§ 12, 15, 17 and 26). The Rules involved are Rules 52(a) and 52(b) of the Federal Rules of Civil Procedure.

The pertinent portions of these statutes and rules are set forth in Appendix "B", *infra*, at pp. 32-33.

Statement of the Case

A. Parties and Cause of Action.

Petitioners are five screenwriters. Respondents are, respectively, seven motion picture producing and distribut

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[1] Plaintiffs, Bilerman, Palmer, Hammer, Kinoy, Kohl, Sondergaard, and Stevenson, who, together with petitioners, were appellants below, do not join in the instant petition.

ing companies[2] (each of which distributes motion pictures produced by themselves and "independent" producers), four of said respondents' subsidiaries or affiliates,[3] and two motion picture trade associations.[4]

The complaint alleges that since about November 25, 1947, and continuously thereafter, respondents and their co-conspirators combined, conspired and agreed in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§1 and 2, to carry on and maintain an industry-wide refusal to deal in the professional products and services of petitioners and other persons who were accused of membership in the Communist Party, past or present, or other "subversive" activities (J.A. 2).[5] These latter activities include among them the exercise of an individual's First or Fifth Amendment rights before a Congressional investigating committee (J.A. 16).

Petitioners sued under Section 16 of the Clayton Act (38 Stat. 737, 15 U. S. C. § 26) for injunctive relief on behalf of themselves and all other persons similarly situated. They also sued under Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15) as persons injured in their respective businesses and property for the damages which each himself sustained, trebled.

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[2] Allied Artists Pictures Corp., Columbia Pictures Corp., Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corp., Twentieth Century-Fox Film Corp., Universal Pictures Co., Inc., and Warner Bros. Pictures, Inc. (hereinafter sometimes referred to as the "producer-distributors").

[3] Allied Artists Distributing Corp., Paramount Film Distributing Corp., Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corp.

[4] The Motion Picture Association of America, Inc. (hereinafter referred to as "MPAA") and the Association of Motion Picture Producers, Inc. (hereinafter referred to as "AMPP").

[5] The letters "J.A." refer to the Joint Appendix printed for use by the court below.

B. The Conspiracy—the Undisputed Facts.

During October, 1947, the House Committee on Un-American Activities (hereafter referred to as "House Committee") held public hearings in the District of Columbia on Communist infiltration of the motion picture industry. Among those subpoenaed to testify were petitioners Lester Cole, John Howard Lawson and Albert Maltz, screenwriters; Adrian Scott, producer; Edward Dmytryk, director; screenwriters Ring Lardner, Jr., Dalton Trumbo, Alvah Bessie and Samuel Ornitz; and Herbert Biberman, writer-director. All of these persons (commonly known as the "Hollywood Ten") invoked the First Amendment to the Constitution as to their political affiliations and refused to answer questions as to whether they then were, or ever had been, members of the Communist Party. Each of the Hollywood Ten was cited and subsequently convicted for contempt of Congress (J.A. 36-37).

On November 24, 1947, members of MPAA, AMPP and the Society of Independent Motion Picture Producers, including among them agents and representatives of a number of respondents or their predecessor corporations convened at the Waldorf-Astoria Hotel in New York. The meeting was presided over by Eric Johnston. After two days of deliberation (J.A. 39-40) and on November 25, 1947, "a written statement of policy was issued, in which the responsible heads of all the motion picture companies present at that meeting concurred" (Ex. 1; J.A. 211).[6]

[6] Eric Johnston's sworn account of what transpired during the "Waldorf meeting" is reproduced in *Cole* v. *Loew's, Inc.* (S. D. Cal.), 8 F. R. D. 508, 524, ftn. 6, reversed (9 Cir.), 185 F. 2d 649, and at pp. 39-40 of the Joint Appendix. For similar versions of what transpired, see depositions of E. J. Mannix, March 31, 1948 (J.A. 270-275); L. B. Mayer, March 10, 1948 (J.A. 310-317, 324-326); and Samuel Goldwyn, March 14, 1950 (J.A. 341-347) taken in *Cole, et al.* v. *Loew's Inc., et al.*, Cal. Super. Court, L. A. County, No. 541446 (common law conspiracy action by "Hollywood Ten"), and the deposition of J. Robert Rubin, July 10, 1951 (J.A. 350-360, 370-371, 381-382) taken in *Cole* v. *Loew's, Inc.*, S. D. Cal., Civil Action No. 8005-Y (breach of contract action by petitioner Cole).

The statement of policy, commonly known as the "Waldorf Declaration", provides in pertinent part, as follows:

> "We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the 10 until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist. * * * "
>
> "We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the government of the United States by force or by any illegal or unconstitutional methods. * * * To this end we will invite the Hollywood talent guilds to work with us to eliminate any subversives; to protect the innocent and to safeguard free speech and a free screen wherever threatened."
>
> "The absence of a national policy, established by Congress, with respect to the employment of Communists in private industry makes our task difficult. Ours is a nation of laws. We request Congress to enact legislation to assist American industry to rid itself of subversive disloyal elements. * * * " (J.A. 41-42)

Shortly after the "Waldorf Declaration" was announced, petitioner Cole, together with Scott, Dmytryk, Lardner and Trumbo, all of whom were employed under fixed term employment agreements with one or more of the respondents (or RKO Radio Pictures, a co-conspirator), were fired and their employment agreements terminated. Petitioners Lawson and Maltz, together with Bessie, Biberman and Ornitz, all of whose professional services had been previously utilized by one or more of the respondents, became "unemployable" (J.A. 48).

By the end of 1953, the "Waldorf Declaration" had become applicable to more than 200 persons (J.A. 59),

including petitioners Young (J.A. 59-61) and Richards (J.A. 86-89).[7]

C. The "Black Market".

On April 23, 1953, as a result of joint negotiations between the producer-distributors and the Writers' Guild (J.A. 65, 130-131), each of the producer-distributor respondents executed separate, but identical, agreements with the Guild.[8] That agreement provided, in pertinent part, as follows:

> "...If a writer, at the time of his employment or at any time thereafter, states in writing that he is not and never was a member of the Communist Party, and such representation is shown to have been false, or if a writer at any time refuses on request of the

[7] During the period from November 25, 1947, to March 8, 1951, the number of persons (other than the Hollywood Ten), with whom respondents refused to deal was relatively small (J.A. 48). However, public hearings on Communist infiltration of the motion picture industry were resumed by the House Committee on March 8, 1951 and extensive hearings were held in 1951, 1952 and 1953. Many Hollywood persons were named as Communists before the Committee, after which they were subpoenaed to testify; others, who were not named as Communists, were subpoenaed also. Cogley, *Report on Blacklisting*, Vol. I, 95 (1956). If the persons who were named or subpoenaed were under contract when they were identified or called to testify before the Committee, they were fired and their contracts cancelled. If they sold their professional products or services in the industry on a free-lance basis, their agents told them their material could no longer be used and they stopped receiving "calls". Cogley, *supra*, at 97. On the other hand, if the named or subpoenaed persons agreed to "cooperate" with the Committee, *i.e.*, to publicly confess their past Communist ties and to furnish names of other persons whom they had known as Communists, then such persons were allowed to continue to sell their professional services in the industry (J.A. 51-53, 154-155; Ex. 58, J.A. 391-394; Ex. 59, J.A. 395-396).

[8] Between 1940 and April 23, 1953, a screenwriter who demanded professional recognition for his product, *i.e.*, screen credit, was entitled to receive it in accordance with the producer's minimum basic agreement with the Writers' Guild (J.A. 64-65).

Producer to make a statement as to whether he is or ever was a member of the Communist Party or if a writer upon such request states in writing that he is a member of the Communist Party, or if a writer before the House Un-American Activities Committee or any similar duly constituted Congressional or State Legislative or executive committee, has refused to testify as to whether he is or was a member of the Communist Party; or if a writer having been subpoenaed to appear before such a committee fails or refuses to appear in response to such subpoena, the Producer shall be relieved of its obligations to the Guild under this Article 6, and shall also be relieved of any obligations to accord credits to the writer under his employment agreement." (Ex. 43, J.A. 237-238)[9]

Once the producers were relieved of their contractual obligations to accord screen credit to petitioners and other "blacklisted" writers, such persons were able to sell their professional products or services to independent producers on a "black market" basis (J.A. 64-66, 96-101, 145-146).[10] And so, after having been forced out of the motion picture industry entirely, petitioners, at least to some degree, were able to resume their careers by using pseudonyms.[11]

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[9] Describing the negotiations leading up to this agreement, the Guild's President said: "* * * the Producers pointed out that the whole problem had been precipitated by a very serious situation faced by many of the Companies. If in all innocence, and even in some cases on the basis of sworn statements, they were to hire—or had hired—a writer who subsequent to his employment was revealed to be a member of the Communist Party or who refused to testify as to such membership, the giving of screen credit to such writer might well spell ruin of the picture through picketing and adverse publicity" (Ex. 44, J.A. 241).

[10] As a matter of industry practice, "independents" conform to the standards negotiated by AMPP members with the Guild, either by becoming signatories to agreements identical to the AMPP-Guild minimum basic agreement (J.A. 149, 158) or as a result of a clause in their distribution-financing agreements with one or more of the producer-distributors (Ex. 55, J.A. 287-287 (1)).

[11] Young (J.A. 67-68); Cole (J.A. 139-142); Lawson (J.A. 98-100); Maltz (J.A. 20, 22, 74); and Richards (J.A. 89-90).

D. The Presumption of Continuance.

In the courts below, petitioners contended that a clearly defined conspiracy in violation of the antitrust laws was in existence during the period November 25, 1947 to April 23, 1953; that the Courts would not assume it was abandoned thereafter;[12] and, thus, that the only fact-issues respondents might have raised below were (1) that the "Waldorf Declaration" had been abandoned, *i.e.*, the conspiracy had been terminated,[13] or (2) that one or more of respondents had repudiated the "Waldorf Declaration", *i.e.*, one or more of them had withdrawn from the conspiracy.[14] Respondents did neither. Instead, they took the position that what they are doing now is precisely the same as what they have done consistently since November 25, 1947 (J.A. 456); and that what they have done consistently since November 25, 1947, was individual, not concerted, action (J.A. 454-455).

Undoubtedly, respondents' failure to come forward with any proof of "termination" or "withdrawal", was dictated by documented facts of record which are not, and could not be, disputed. For example, the Court will search in vain for any denial of the fact that on August 21, 1959, B. B. Kahane, Vice-President of respondent Columbia Pictures Corporation and an AMPP representative, assured the American Legion's Americanism Commission that all but four of the 224 persons named by the Legion as "subversive" were no longer at work in the motion picture industry, and that the four who were, were working for "independents" not subject to the AMPP's control (J.A. 70-72,

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[12] *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952); *Local 167 International Brotherhood of Teamsters, etc.* v. *United States*, 291 U. S. 293, 297-298 (1934).

[13] *United States* v. *Kissel*, 218 U. S. 601, 607-608 (1910).

[14] *Hyde* v. *United States*, 225 U. S. 347, 369 (1912).

Ex. 12, J.A. 215-217). It will search in vain for any denial that, in response to the Legion's convention resolution praising the industry as a whole, an AMPP news-release (a copy of which was obtained from the AMPP) quoted Mr. Johnston as follows:

> "It is indeed gratifying to receive from the American Legion recognition of the motion picture industry's well established patriotism. The policy laid down by the industry heads at the so-called Waldorf Conference in November, 1947 has been the governing policy of the industry, ~~con-tally~~ without interruption since that date." (J.A. 72-73)

And it will search in vain for any denial that the standards agreed upon by respondents in their separate, but identical, minimum basic agreements with the Writers' Guild on April 23, 1953 (Ex. 43, J.A. 237-238) were carried forward in succeeding agreements (J.A. 106-107), and are presently contained in existing ones (J.A. 74-75).

E. The November 4, 1960 Policy.

On November 4, 1960, and as a result of an MPAA meeting the day before, Eric Johnston re-enunciated "the policy of the MPAA member companies in regard to the hiring of Communists in the creation of motion pictures," *i.e.*, (1) no company would knowingly employ a Communist and (2) each company had the responsibility to determine for itself whether any person it employed was a Communist (Ex. 31, J.A. 233). As Mr. Johnston's November 4, 1960 letter makes clear, that policy "applie[d] to pictures made by [MPAA] member companies and to pictures financed or co-produced by [MPAA] member companies in association

with others for distribution by MPAA member companies" (Ex. 31, J.A. 233).[15]

Prior to November 4, 1960, petitioner Young and others similarly situated had been able to sell their professional services under their own names (or under pseudonyms registered with the Writers' Guild) to independent producers who distributed their films through United Artists Corporation (J.A. 73-74, 82).[16] However, since United Artists was one of the MPAA member companies participating in the November 3, 1960 meeting (Ex. 31, J.A. 233), petitioners believed that, unless they were "cleared" first (J.A. 83, 90-92), they could continue to sell their services in the industry on a "black market" basis only (J.A. 92, 92-93) and that non-"black market" sales to independents distributing through United Artists were foreclosed (J.A. 82-84, 516(3)-516(4), 516(7)).

On December 30, 1960, the complaint (J.A. 2) and a motion for preliminary injunction (J.A. 28) were simultaneously filed in the United States District Court for the District of Columbia.

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[15] The vast majority of feature films are, at the present time, made by independent producers, financed in whole or part by the distributor-members of MPAA who distribute the independents' product through their nation-wide distributing facilities (J.A. 79-80, 145-146). In 1960, for example, 167 of the 211 feature films approved by the industry's Production Code Administration were produced by independents and distributed by MPAA members (*Film Daily Year Book*, 99 (1961)). The independent's access to the exhibitor is, in a practical sense, controlled by the distributor (J.A. 80), and is accomplished by means of distribution-financing agreements made in advance of production (J.A. 79-80, 147). As a result of certain "employment controls" in these agreements (J.A. 80-81; Ex. 55, J.A. 383-385), the producer-distributor respondents are able to exercise an absolute veto over the independent's purchase of professional services (J.A. 80-81, 146-147, 153, 501-502).

[16] Unlike the producer-distributor respondents, United Artists permits independent producers who distribute through its facilities considerable autonomy in the selection and purchase of professional services (J.A. 81-82).

F. Proceedings in the District Court.

Subsequent to the filing of the complaint and motion for preliminary injunction in the District Court (J.A. 5740), an order was entered (J.A. 575) granting respondents until March 30, 1961 to oppose the motion for preliminary injunction.

On March 30, 1961, respondents filed answers and an opposition to the motion for preliminary injunction (J.A. 576-577). In their opposition, respondents asserted that the several affirmative defenses set forth in their answers constituted "miscellaneous other obstacles barring issuance of a preliminary injunction" (J.A. 550) whereupon petitioners filed a motion to strike these defenses as "insufficient in law" (J.A. 577). Argument on petitioners' motions for preliminary injunction and to strike respondents' affirmative defenses was eventually heard by the District Court on July 19, 1961.

1. *The End of the "Black Market".*

In the interim, and on March 24, 1961, the Writers' Guild announced (108-111, 132) that it would not permit the "black market" to exist in violation of its June 13, 1960 minimum basic agreements (J.A. 74-75).[5] This announcement, together with the November 4, 1960 "policy of the MPAA member companies" (Ex. 31, J.A. 233), effectively prohibited petitioners Young, Lawson and Richards, Writers' Guild members, from working "black market" at all (J.A. 111, 132, 148, 158), and "black market" opportunities for petitioners Cole and Maltz, non-Guild members, were limited to those independent producers who, at one and the same time, were (1) non-signatories to

[5] June 13, 1960, the prior agreements relieving producers of their obligation to accord screen credit to "blacklisted" writers (Ex. 43, J.A. 237-238; J.A. 106-107) were amended to provide that a writer could be deemed screen credit *only* if the producer was unaware of the writer's "blacklisted" status (J.A. 74-75, 158).

minimum basic agreements with the Guild, and (2) willing to run the risk of breaching their distribution-financing agreements with one or more of the producer-distributor respondents (J.A. 148-149, 158). Guild member, or non-Guild member, the effect was the same: petitioners were excluded from the industry *once more*.[18]

2. *Scope of Relief Sought On the Hearing In the District Court.*

During the hearing before the District Court on July 19, 1961, petitioners sharply limited their demand for injunctive relief (J.A. 547, 558). Since Mr. Johnston's November 4, 1960 letter, in conjunction with the Guild's March 27, 1961 policy with respect to enforcement of its June 13, 1960 agreements, excluded petitioners from even working "black market" (J.A. 554, 560), respondents were to be restrained from individually using their distribution-financing agreements to prevent independent producers from utilizing petitioners' talents (J.A. 557-558) and from acting in *concert* at the distributor level *only* (J.A. 547).

3. *The Preliminary Injunction is Denied.*

On July 24, 1961, the District Court caused a docket entry to be made in which the motion for preliminary injunction

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[18] The Guild's position was clearly stated in its application for intervention in *Pollock* v. *Motion Picture Association of America, Inc., et al.* (D. C., D. C., C. A. No. 789-61): "In an affidavit * * * plaintiff Pollock avers that he has sought to have the Guild waive its working rules and its collective bargaining contracts to permit him to sell his literary products on the black market. The Guild has refused to permit Pollock to do so * * *. [The Guild's] economic interests are, therefore, antagonistic to Pollock's to the extent that Pollock has either used or sought to use the literary black market in violation of the Guild's working rules and collective bargaining agreements. By his use or attempt to use the black market, Pollock has acted in conflict with the Guild's working rules and contracts. It is precisely because the Guild must protect the integrity of its rules and contracts that the Guild seeks to intervene [in the Pollock case]." (J.A. 559-560).

was denied and the motion to strike the affirmative defenses was denied "without prejudice" (J.A. 564). The District Court did not write an opinion. Later that day, in response to a query whether arrangements had been made for findings of fact and conclusions of law, petitioners' counsel was informed that "the judge has not requested findings" (R. 581). Three days later, counsel ascertained that the District judge had left the country on his vacation and was not expected to return until September. (R. 582).

G. Proceedings in the Court of Appeals.

A notice of appeal from the order denying the motion for preliminary injunction was filed on July 28, 1961 (J.A. 565) and the entire original record was docketed in the Court of Appeals (No. 16, 523) on August 8, 1961 (J.A. 579).

Respondents submitted their "proposed findings" to the District Court on August 15, 1961 (J.A. 566). However, inasmuch as the District Judge was then on his vacation, respondents' "proposed findings" were not signed until September 11, 1961 (J.A. 578). A formal order denying the motion for preliminary injunction was entered the same day (J.A. 571). A notice of appeal from that order was filed September 12, 1961 (J.A. 572) and that appeal was docketed in the Court of Appeals as No. 16,624. By order dated September 18, 1961 (R. 586), the appeals in No. 16,523 and No. 16,624, were consolidated.

The consolidated appeals were argued in the Court of Appeals on December 12, 1961. During oral argument and in their brief, petitioners urged, as a corollary to their main postion,[19] that in view in the manner in which the District

[19] The main thrust of petitioners' argument below was that since respondents' violations of the antitrust laws were established by documents, the sworn testimony of respondents' officers in prior proceedings, and undisputed facts, the only issues on the appeals were issues of law (App. Br., 13-15, 19-30).

Court had made its findings, the Court of Appeals should review them "uninhibited by the 'clearly erroneous' rule set forth in Rule 52(a) of the Federal Rules of Civil Procedure" (App. Br., 22-23).

On January 18, 1962, the action of the District Court was affirmed (299 F. 2d 119).

In its opinion of January 18, 1962, the Court of Appeals stated: "After a lengthy hearing including extended argument, the trial court, in accordance with Fed. R. Civ. P. 52(b), made findings of fact" (299 F. 2d, at 120).[2a] It then proceeded to set forth the "pertinent findings", verbatim, and concluded that the action of the District Court did not constitute "clear error or abuse of discretion" (299 F. 2d, at 121).

On January 31, 1962, petitioners filed a petition for rehearing *en banc* (R. 594) and called attention to the following: (1) neither petitioners nor respondents made any motion under Rule 52(b) of the Federal Rules of Civil Procedure; (2) if the submission by respondents of their proposed findings of fact and conclusions of law (J.A. 566) on August 15, 1961 was treated as a motion under Rule 52(b), that motion was out of time; (3) prior to September 11, 1961, there were no findings to which a motion under Rule 52(b) could be addressed and (4) since a notice of appeal from the order denying the motion for preliminary injunction (J.A. 564) was filed on July 28, 1961 (J.A. 565) and the entire original record was docketed in the Court of Appeals in No. 16,523 on August 8, 1961 (J.A. 579), the District Court had no jurisdiction thereafter to entertain a motion under Rule 52(b).

The petition for rehearing *en banc* was denied on February 15, 1962 (R. 605).

[2a] The hearing did not involve the taking of testimony and consisted of extended argument on the record submitted.

Reasons For Granting The Writ

The Court of Appeals held that the District Court had not committed "clear error or abuse of discretion" in denying petitioners' motion for preliminary injunction (299 F. 2d, at 121). This holding was bottomed on "findings" submitted by respondents to the District Court seven days *after* the record had been filed in the Court of Appeals, while the District Judge was vacationing in Europe, and which he signed upon his return, forty-nine days after the motion for preliminary injunction was denied.

The Court of Appeals' failure to come to grips with the critical issue of this case resulted directly from the deference it paid to the District Court's "findings" (299 F. 2d, at 120). Because of the way in which these findings were made, the Court of Appeals was required either to (1) remand for proper findings or (2) review them uninhibited by the "clearly erroneous" rule. In the light of the narrow scope of review afforded on the appeal below, and on appeals from denials of preliminary injunctions generally, we believe this issue crucial, not only to the result which was reached in this case, but to the proper administration of justice in the District Courts.

I

The Critical Issue of This Case Raises An Important Question of Federal Law Which Has Not Been, But Should Be, Resolved By This Court.

In this case, it is clear that since November 25, 1947, respondents have set themselves up as an extra-governmental agency without Congressional authority to prescribe rules for regulating and restraining interstate commerce and to provide extra-judicial tribunals for deter-

ruining and punishing persons whom they suspect of being "Communists" by refusing in concert to let themselves or independent producers purchase professional services from them (Ex. 31, J.A. 233). This is a violation of the antitrust laws. *Fashion Originators' Guild v. FTC*, 312 U. S. 457, 468 (1941). Yet, the District Court denied petitioners a preliminary injunction on the ground, *inter alia*, that respondents' action was "reasonable." (J.A. 168). In our view, respondents could not avoid a preliminary injunction in the District Court simply by hollering "Communist". In the fourteen years that respondents have operated their extra-judicial tribunals, they have condemned and punished Communists, ex-Communists, non-Communists, and, perhaps, even Republicans (J.A. 87-88, 112-128, 132-133, 193-194).

Whatever reason respondents urged to justify their challenged action below, and no matter how socially desirable the District Court thought it to be, respondents should not have escaped the reach of the Sherman Act. Indeed, the District Court should have ruled, that it is just as much a violation of the antitrust laws to concertedly refuse to deal with alleged "loyalty risks" as it was to concertedly refuse to deal with alleged "credit risks" (*United States v. First National Pictures, Inc.*, 282 U. S. 44, 54 [1930]); that it is just as much a violation of the antitrust laws to concertedly refuse to deal with alleged "pro-Communists" during the "Cold War" as it was to concertedly refuse to deal with alleged "pro-Germans" during World War I (*Council of Defense v. International Magazine Co.* (8 Cir.), 267 Fed. 390, 411-412 [1920]); and that it is just as much a violation of the antitrust laws to engage in a group boycott to eliminate suspected "subversives" as it was to engage in a group boycott to eliminate suspected "design pirates". *Fashion Originators' Guild v. FTC*, 312 U. S. 457, 468 (1941).

The question whether the District Court had discretion to deny petitioners a preliminary injunction on the

ground that respondents' action might be "reasonable" is fundamental to private enforcement of the antitrust laws. Even more important, it raises issues going to the heart of our society. "[The antitrust laws] reinforce our ideal of careers open to superior skills and talent, a crucial index of a free society." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 2 (1955). This question was left unanswered by the Court of Appeals (299 F. 2d, at 121). In our view, it is an important question of Federal law which has not been, but should be, resolved by this Court.

II

The Decision Below Is In Conflict With Decisions of Other Courts of Appeals.

(a) The District Court denied the motion for preliminary injunction on July 24, 1961 (J.A. 564) and a notice of appeal from that order was filed on July 28, 1961 (J. A. 565). Respondents submitted their proposed findings of fact and conclusions of law on August 15, 1961 (J.A. 578). However, inasmuch as the entire original record had been transmitted to the Court of Appeals on August 8, 1961, the District Judge had no opportunity to check respondents' proposed "findings" against the record[4] and, in fact, did not even cross out the words "submitted by defendants" in the findings which he signed *seven weeks* after he denied the preliminary injunction (J.A. 566).

The manner in which the findings were made by the District Court required either that the Court of Appeals remand for proper findings or that it review the findings before it uninhibited by the "clearly erroneous" rule. In failing to do so, the Court of Appeals decided

[4] During this period the District Judge was in Europe.

this question in a way in conflict with the decisions of the Courts of Appeals for the Second, Third and Fourth Circuits. *Tanker Hygrade No. 24 v. The Dynamic* (2 Cir.), 213 F. 2d 453, 456; *Mesle v. Kea S. S. Corp.* (3 Cir.), 260 F. 2d 747, 750, *certiorari denied*, 359 U. S. 966 (1959); *The Severance* (4 Cir.), 152 F. 2d 916, 918.[22]

(b) The Court of Appeals held that the findings of the District Court were made "in accordance with Fed. R. Civ. P. 52(b)" (299 F. 2d, at 120), and thus ignored the problem whether the findings of the District Court were entitled to the benefit of the "clearly erroneous" rule. In attempting to avoid a resolution of that problem by treating the challenged findings as made in accordance with Rule 52(b), the Court of Appeals created many more problems than it solved.

Rule 52(b) provides that upon "motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings. * * *." Neither petitioners nor respondents made any motion under Rule 52(b). And, if the submission by respondents of their proposed findings of fact and conclusions of law (J.A. 566) on August 15, 1961 was treated as a motion under Rule 52(b), that motion was out of time.[23] In addition, the District Court did not make any findings to which a motion under Rule 52(b) could be addressed.[24]

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[22] On this issue, the decision below is apparently in accord with the rule in the Fifth and Seventh Circuits. *E.g., Edward Valves, Inc. v. Cameron Iron Works* (5 Cir.), 289 F. 2d 355, 356, *certiorari denied*, 368 U. S. 833 (1961); *Mississippi Valley Barge Line Co. v. Cooper Terminal Co.* (7 Cir.), 217 F. 2d 321, 322-323.

[23] The motion for preliminary injunction was denied on July 24, 1961 (J.A. 564).

[24] Rule 52(b) provides the machinery for amending or making findings in addition to those already made. It is not a substitute for the requirements of Rule 52(a).

Furthermore, since a notice of appeal from the order denying the motion for preliminary injunction on July 24, 1961 was filed on July 28, 1961 (J.A. 565) and the entire original record was docketed in the Court of Appeals (Appeal No. 16,523) on August 8, 1961, the District Court had no jurisdiction thereafter to entertain a motion under Rule 52(b) of the Federal Rules of Civil Procedure. In holding to the contrary, the court below decided this question in a way in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Fiske* v. *Wallace*, 115 F. 2d 1003, 1004-1005, *certiorari denied*, 314 U. S. 663 (1941).

III

The Decision Below Is In Conflict With the Applicable Decisions of This Court.

(a) The purpose of findings is (1) to aid the trial judge in ascertaining the facts and (2) to aid the appellate court on review. *E.g., United States* v. *Forness* (2 Cir.), 125 F. 2d 928, 942-943, *certiorari denied*, 316 U. S. 694 (1942). Yet the findings made in this case aided neither the trial judge in ascertaining the facts, nor the Court of Appeals in making its review.

Since the appeal under 28 U.S.C. § 1292(a)(1) was an appeal from a denial of a preliminary injunction, the issue before the Court of Appeals was limited to "abuse of discretion." *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136 (1920). And since the District Court did not write an opinion (J.A. 564), the "abuse of discretion" issue could only have been decided on the basis of the challenged findings. *Public Service Commission* v. *Wisconsin Tel. Co.*, 289 U. S. 67, 70-71 (1933). That is why it was "of the highest importance to a proper review of the action of [the District Court] that there should be a fair compliance with Rule 52(a) of the Rules of Civil Procedure

Mayo v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

In order to decide that the action of the District Court did not constitute "clear error or abuse of discretion", the Court of Appeals had to know the basis upon which the District Court had acted. Findings made forty-nine days after a motion for preliminary injunction is denied and which cannot be checked against the record do not supply such information. *Cf. Matton Oil Transfer Corp.* v. *Tug Dynamic* (2 Cir.), 123 F. 2d 999, 1001. In holding to the contrary, we believe the Court of Appeals decided this issue in a way in conflict with this Court's decisions in *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940), and *Public Service Commission* v. *Wisconsin Tel. Co.*, 289 U. S. 67, 70-71 (1933).

(b) Once the notice of appeal had been filed and the record docketed in the Court of Appeals, the District Court had no jurisdiction to entertain a motion under Rule 52(b) or, in the absence of such motion, to make findings either under Rule 52(a) or Rule 52(b). *Martin* v. *Drexel Ice Cream Co.* (7 Cir.), 80 F. 2d 768, 770. In holding to the contrary (299 F. 2d, at 120), we believe the Court of Appeals decided this issue in a way in conflict with this Court's decisions in *Generes* v. *Bonnemer*, 7 Wall. 564, 565, 19 L. Ed. 227 (1869); *Arcendano Bros.* v. *Gay*, 8 Wall. 376, 377, 19 L. Ed. 422 (1869); and *Kearney* v. *Case*, 12 Wall. 275, 280, 20 L. Ed. 395 (1871).

(c) Since the material facts on which petitioners' claim for relief was based consisted of documents and the sworn testimony of respondents' officers in prior proceedings, Findings 10 and 11 (J.A. 567-568) involved only a question of law.[5] In leaving this question unanswered, the

[5] If, however, Rule 52(a) was applicable (see *C. I. K.* v. *Duberstein*, 363 U. S. 278, 291 [1960]), Findings No. 10 and 11 would have been "clearly erroneous". *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395-396 (1948).

Court of Appeals apparently relied on the District Court's subsidiary "findings" (*i.e.*, (1) that petitioners' delay in filing the action (the conspiracy originated in 1947) "negatived any finding of urgency necessary to justify the interlocutory relief sought" (Finding No. 12, J.A. 568); (2) the injuries claimed by petitioners "could be adequately compensated for by damages" (Finding No. 13, J.A. 569); and (3) the decree requested was inappropriate in that it would require the court to supervise, *pendente lite*, the employment practices of a substantial portion of the motion picture industry (Finding No. 14, J.A. 569).

While these findings purportedly related to the factual situation which existed on December 30, 1960, the date the action was commenced (see *supra*, pp. 10-11), they were wholly unresponsive to the factual situation existing on July 19, 1961, the date of the "hearing" before the District Court (see *supra*, pp. 12-13).[28]

Since the right to a preliminary injunction is determined as of the date of the hearing, not as of the date the action is commenced, the issue of "clear error or abuse of discretion" turned on a question of law to be resolved in the light of the undisputed facts existing as of the date of the "hearing". The Court of Appeals refused to decide that law question, apparently on the ground that the action of the District Court did not constitute "clear error or abuse of discretion" in the light of the facts existing as of the date the action was commenced. In doing so, the Court of Appeals decided this issue in a way in conflict with this Court's decisions in *Duplex*

[28] On December 30, 1960 irreparable injury flowed from the black market conditions under which petitioners were required to work without screen credit. *Dyer v. Michael Todd Co.*, S. D. N. Y., 151 F. Supp. 801, 803. On July 19, 1961, irreparable injury flowed from the deprivation of each petitioner's right to pursue his calling on any terms. *Lucas v. McElroy*, 360 U. S. 474, 492-493 (1959); *Truax v. Raich*, 239 U. S. 33, 38 (1915).

Printing Press Co. v. *Deering*, 254 U. S. 443, 464 (1921), and *American Steel Foundries Co.* v. *Tri-City Council*, 257 U. S. 184, 201 (1921).

IV

The Action of The Court of Appeals Requires The Exercise of This Court's Power of Supervision.

Rule 52(a) of the Federal Rules of Civil Procedure places the duty and responsibility for fact finding squarely upon the trial judge. The rule provides that "the *court* shall find the facts * * *" (emphasis supplied). Here, with no opinion to guide prevailing counsel, "findings" were submitted to the District Court seven days *after* the record had been filed in the Court of Appeals, while the District Judge was vacationing in Europe, and which he signed upon his return, forty-nine days after the preliminary injunction had been denied. The Court of Appeals held that the trial court "made findings of fact" (299 F. 2d, at 120).

Petitioners' motion for preliminary injunction was denied on July 24, 1961 (J.A. 564). Later that day, in response to a query whether arrangements had been made for findings of fact and conclusions of law, petitioners' counsel was informed that "the judge has not requested findings" (R. 581). Apparently, on the date the motion for preliminary injunction was denied, the District Judge was of the view that "no issue of fact was presented * * * on the hearing of the motion for preliminary injunction, [in which event] findings of fact were unnecessary." *Urbain* v. *Knapp Brothers Manufacturing Co.* (6 Cir.), 217 F. 2d 810, 816, *certiorari denied*, 349 U. S. 930 (1955); *Yanish* v. *Barber* (9 Cir.), 232 F. 2d 939, 947. Thus, if the District Judge had made findings on July 24, 1961, when the matter was still fresh in his

mind, "the abuse of discretion" issue on appeal would have turned on questions of law. *Douds* v. *Local 1250, etc.* (2 Cir.), 170 F. 2d 695, 699.

Here, the failure to find the facts before or contemporaneously with the denial of the motion for preliminary injunction was not merely a failure to observe the "better practice". *Gibbs* v. *Buck*, 307 U. S. 66, 78 (1939). In this case, with no opportunity to check respondents' "proposed findings" against the record, the District Judge signed them in the form submitted on September 11, 1961. If the findings had been made in this manner on July 24, 1961, the matter would have been fresh in the District Judge's mind and objections, raised by motion under Rule 52(b), could have been considered in light of the record before the court. *Cf. United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177, 184-185 (1944). On September 11, 1961, the matter was not fresh in the District Judge's mind, the District Court no longer had jurisdiction to entertain a motion under Rule 52(b), and the entire original record had been transferred to the Court of Appeals. Thus, the findings signed on September 11, 1961 were not the findings of the District Court; they were, instead, the findings of prevailing counsel who had no opinion to guide them. *Cf. Chicopee Manufacturing Co.* v. *Kendall Co.* (4 Cir.), 288 F. 2d 719, 724.

This Court has emphasized that in granting or refusing a preliminary injunction "there should be fair compliance with Rule 52(a) . . . ." *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940). And in this case, there was no compliance, fair or otherwise, with that rule. *Matton Oil Transfer Corp.* v. *Tug Dynamic* (2 Cir.), 123 F. 2d 999, 1001; *United States* v. *Forness* (2 Cir.), 125 F. 2d 928, 942-943, *certiorari denied*, 316 U. S. 694 (1942). Yet, the Court of Appeals held that the trial

court "made findings of fact" (299 F. 2d, at 120). In doing so, we think the Court of Appeals sanctioned so far a departure from the accepted and usual course of judicial proceedings by the District Court, as to require the exercise of this Court's power of supervision.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16523 and No. 16,624

NEDRICK YOUNG, *et al.*,
Appellants.

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided January 18, 1962

MR. DAVID I. SHAPIRO, with whom MR. A. L. WIRIN was on the brief for appellants.

MR. WILLIAM P. ROGERS for appellees. MESSRS. WILLIAM R. GLENDON and GEORGE F. BASON also entered appearance for appellees.

Before: WASHINGTON, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: We have before us consolidated appeals from orders of the United States District Court for the District of Columbia denying appellants' motion for preliminary injunction. Appellants are seven screen writers, one writer-director, and four screen

actors. Appellees are seven motion picture producing and distributing companies, four of said appellees' subsidiaries or affiliates, and two motion picture trade associations.

The action in the District Court was based on Sections 1, 2 and 7 of the Sherman Act,[1] and Sections 4, 12 and 16 of the Clayton Act.[2] Certain named defendants have, by their answers, raised jurisdictional defenses not as yet determined by the District Court, and were not made parties to the motion for preliminary injunction.

After a lengthy hearing, including extended argument, the trial court, in accordance with Fed. R. Civ. P. 52(b), made findings of fact. The pertinent findings follow:

"8. In this application for a preliminary injunction the plaintiffs allege that, pursuant to a conspiracy in violation of the antitrust laws, the defendants have maintained an industry-wide blacklist whereby the plaintiffs and other persons named as Communists or identified with Communism are precluded from employment in the motion picture industry.

"9. Each defendant has denied each of the substantive allegations of the complaint and has asserted that any action it may have taken concerning the employment of any plaintiff was individual, non-conspiratorial and reasonable.

"10. The record is clear that each producer and distributor defendant has been faced with identical or similar problems in regard to the employment of individuals identified as being Communists or having Communist connections, in that the employment of such individuals has led to protests by members of Congress and the public, picketing and threats of boycotts by various civic and patriotic groups, posing a threat to the economic well-being of each defendant. The record is insufficient to

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[1] 26 Stat. 209, 210 (15 U. S. C. §§ 1, 2 and 15).

[2] 38 Stat. 731, 736, 737 (15 U. S. C. §§ 15, 22 and 26).

show that the defendants, in attempting to deal with these legitimate business problems have acted in concert or pursuant to a conspiracy or that they have maintained an industry-wide blacklist. Rather the record is consistent with the conclusion that each defendant acted individually, non-conspiratorially and in a reasonable manner.

"11. The many factual issues raised in this case by the parties are not susceptible of resolution at this preliminary stage and it is apparent to the Court that a trial must be had and all the facts fully explored at that time. It is sufficient to say now that the evidence in its present form does not establish that any of the defendants have acted in violation of the antitrust laws or that the extraordinary relief sought is justified.

"12. The alleged conspiracy to blacklist is claimed to have originated in 1947. The plaintiffs allege that since various dates in the period 1947-1958 each has been generally unemployable in the motion picture industry as a result of the claimed conspiracy. This action was filed on December 30, 1960. The delay in filing this action negatives any finding of urgency necessary to justify the interlocutory relief sought.

"13. The record fails to establish that the injuries claimed by plaintiffs could not, if proven, be adequately compensated for by damages.

"14. The decree requested is inappropriate and impractical in that it would require the Court *pendente lite* to attempt to supervise the employment practices of a substantial portion of the motion picture industry, which would inject the Court into the personnel problems involved in the hiring and firing of individuals in the industry."

The court concluded:

"1. On the basis of the record before the Court, the plaintiffs have not established that the defendants have combined to violate the antitrust laws.

"2. The plaintiffs have an adequate remedy at law.

"3. The plaintiffs have failed to establish irreparable injury which would justify the relief requested.

"4. The plaintiffs are barred by their laches from equitable relief *pendente lite*.

"5. The plaintiffs have failed to show that there is a reasonable certainty that they will ultimately prevail.

"6. A preliminary injunction should be denied."

Accordingly, an order was entered denying appellants' motion for a preliminary injunction, and these appeals followed.

Appellants recognize the general rule that a denial of a preliminary injunction will not be set aside on appeal unless the District Court's action constitutes clear error or abuse of discretion, and that ordinarily this court will not consider the merits of the case further than necessary to determine whether that discretion was abused. *Cox v. Democratic Central Committee*, 91 U. S. App. D. C. 416, 200 F. 2d 356 (1952). They contend, however, that where the material facts are not or cannot be disputed a court "has no judicial discretion by denial of an injunction to continue a deprivation of basic human rights."

We, of course, recognize these general principles of law as to the duty of the appellate court on the granting or denial by the trial court of a motion for preliminary injunction.

Our review of the record before the District Court convinces us that the District Court's action does not in fact constitute a "clear error or abuse of discretion," and was adequately based on the record made.

This is not a case in which we deem it appropriate to attempt to determine, or to canvass in any way, the merits of the alleged cause of action. As was said in *Benson*

Appendix "A"

Hotel Corp. v. *Woods*, 168 F. 2d 694 (8th Cir. 1948), "nor would any determination of those questions [presented by motion for preliminary injunction] by this court on appeal be binding on the trial court nor upon either of the parties in considering and determining the merits of the controversy." See also *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 207 F. 2d 190, 199 (9th Cir. 1953). We do not intend our present decision to have any such binding effect.

Affirmed.

APPENDIX "B"

Statutory Provisions and Rules Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1:

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *."

Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

Section 1 of the Clayton Act, 38 Stat. 730, 15 U. S. C. § 12:

* * *

"'Commerce,' as used in sections 12, 13, 14-21, and 22-27 of this title, means trade or commerce among the several States * * *."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damages by him sustained * * *."

Section 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17:

"The labor of a human being is not a commodity or article of commerce * * *; nor shall [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Appendix "B"

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon * * * a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *."

Rule 52(a), Federal Rules of Civil Procedure:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * * *."

Rule 52(b), Federal Rules of Civil Procedure:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly * * *."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 948

NEDRICK YOUNG, ET AL.,
Petitioners,

—against—

MOTION PICTURE ASSOCIATION OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

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June 1, 1962

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FEDERAL RULES OF CIVIL PROCEDURE:

Rule 52(a) 8

Rule 52(b) 8

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RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

This brief is submitted by Respondents in opposition to the petition for a writ of certiorari to review the judgment below (rehearing *en banc* unanimously denied, R. 605), which affirmed an order of the District Court denying a preliminary injunction in a private antitrust suit (J. A. 571).* This judgment is clearly correct, presents no important question of Federal law, involves no conflict of decisions and obviously does not call for the exercise of this Court's supervisory power.

*The letters "J. A." refer to the Joint Appendix printed in the Court of Appeals.

QUESTION PRESENTED

The first question presented by Petitioners (Petition, p. 2) in fact does not arise on this record. The question assumes, contrary to the Findings of the District Court, that at this interlocutory stage a concerted refusal to deal has been established and that the legal sufficiency of the defense of reasonableness to such an assumed state of facts is thereby in issue. No concerted refusal to deal has been shown and this purported question is not present here.

Although Petitioners attempt to raise a variety of other questions, in Respondents' view the question presented is: Where on the denial of a Motion for a Preliminary Injunction, the Proposed Findings submitted by prevailing counsel were adopted by the District Court, did the Court of Appeals apply the proper standards of review when it searched the record and found that there had been no "clear error or abuse of discretion" and further found that the District Court's action was "adequately based on the record made"?

STATEMENT OF THE CASE

Proceedings Below

This is a private antitrust action, brought by twelve Plaintiffs,* charging a conspiracy to exclude from employment in the motion picture industry individuals identified with Communism. The claimed conspiracy is alleged to have arisen in 1947 and to have injured Plaintiffs at various

*While the Motion for a Preliminary Injunction was brought in the District Court by all twelve of the Plaintiffs (J. A. 28), only five are Petitioners here. Conversely, while preliminary injunctive relief was not sought against three of the thirteen Defendants (J. A. 547), Petitioners have designated all Defendants as Respondents here.

dates beginning not later than 1953 (J. A. 568). It was not until December 30, 1960, that this action for injunctive relief and treble damages was begun (J. A. 2).

Prior to the hearing on the Motion for a Preliminary Injunction, answers and affidavits denying each of the material allegations of the complaint, including the allegations of a conspiracy were filed by each Respondent (J. A. 307-310, 517-544). The answers also raised several affirmative defenses, including *res judicata*, estoppel and release (see, e.g., J. A. 401-410). Respondents demanded a Jury Trial (J. A. 577).

The Motion for a Preliminary Injunction was not brought on for hearing until July 19, 1961, some seven months after it was filed (J. A. 547). An extended hearing thereon was had, and on July 24, 1961 the District Court caused a docket entry to be made denying the Motion.* The docket entry directed: "(Orders to be presented)" (J. A. 564). Petitioners, without waiting for such an order, appealed from the docket entry four days later (J. A. 565). At Petitioners' instance, the original record was quickly transmitted to the Court of Appeals (J. A. 578-579). Shortly thereafter, a motion for an expedited appeal, subsequently withdrawn on consent, was filed in the Court of Appeals (R. 581). On August 15th, Respondents served and filed Proposed Findings of Fact and Conclusions of Law (J. A. 566-570). No counter-findings or objections to Respondents' Proposed Findings were submitted by Petitioners. On September 11, 1961, the Proposed Findings and Conclusions were adopted by the District Court and an order denying the Motion for Preliminary Injunction was entered (J. A. 571). Thereafter

*The Court also heard and denied without prejudice Petitioners' "Motion to Strike Defendants' Affirmative Defenses and to Dismiss Counterclaims" (J. A. 564).

Petitioners appealed from the order of the District Court, which Appeal was consolidated with the earlier purported Appeal (R. 586).

Following affirmance of the District Court's order on January 18, 1962, Petitioners sought a rehearing *en banc* urging substantially the same grounds as are sought to be raised here (R. 594). That Petition was unanimously denied by the full Court (R. 605) and the instant Petition followed.

The Record Below

The Petitioners' Statement of the Case is wholly inaccurate and misleading because it is premised squarely on the proposition that a conspiracy has been found and established by undisputed facts (Petition, pp. 5-7). The District Court found that no such conspiracy had been shown on the record made on the subject Motion (J. A. 568). The Court of Appeals affirmed (299 F. 2d 119).

Actually, Petitioners' "undisputed facts" are based largely upon self-serving affidavits replete with hearsay, conjecture, speculation and argument. (See, e.g., J. A. 32, 64, 74, 139, 174). Thus, in the District Court three of the Petitioners moved for summary judgment upon the same affidavits which were the basis of the preliminary injunction motion. After Respondents challenged the competency of these affidavits by filing a motion to strike (J. A. 516(20)), Petitioners withdrew, without prejudice, their summary judgment motion.

And when Petitioners speak of "undisputed" facts consisting of "documents" (Petition pp. 5, 21) they are referring *inter alia* to such things as old newspaper and magazine

articles (e.g. Exh. 11-J. A. 72, Exhs. 13-16-J. A. 72; J. A. 214(5), 214(12), 214(18)); an unissued press release (Exh. 17-J. A. 72-73), copies of unauthenticated letters (e.g. J. A. 219-223) and even what purports to be a transcript of a telecast by a news commentator (Exh. 23-J. A. 84).

Other "documents" which serve as the foundation for Petitioners' distribution-financing argument (Petition, p. 11, fn. 15) consist of one undated, unexecuted document purporting to come from the files of one of the Respondents (J. A. 382(1)-389(1)) and an excerpt from another document, said by two of Petitioners to be "typical" but otherwise unidentified and unauthenticated (J. A. 80, 147).

No purpose would be served by a lengthy recitation of the record at this point. As the District Court itself found (J. A. 568):

> "11. The many factual issues raised in this case by the parties are not susceptible of resolution at this preliminary stage and it is apparent to the Court that a trial must be had and all the facts fully explored at that time."

The facts material to this case commenced in 1947. At that time, a group of individuals, identified with the motion picture industry, including some of Petitioners, appeared before the House Un-American Activities Committee. Their conduct and testimony there was such as to bring public obloquy not only upon themselves, but also upon the entire motion picture industry as well (J. A. 201-10, 259(1)-(4), 551). The continuing problem created for producers and distributors of motion pictures was recognized by the District Court which found (J. A. 567-568):

> "10. The record is clear that each producer-and-distributor defendant has been faced with identical

> or similar problems in regard to the employment of individuals identified as being Communists or having Communist connections, in that the employment of such individuals has led to protests by members of Congress and the public, picketing and threats of boycotts by various civic and patriotic groups, posing a threat to the economic well-being of each defendant."

Petitioners now assert, and claim they have proven, that in meeting these problems the Respondents created a conspiracy to maintain an industry wide blacklist of communists. The District Court held directly to the contrary, finding (J. A. 568):

> "The record is insufficient to show that the defendants, in attempting to deal with these legitimate business problems have acted in concert or pursuant to a conspiracy or that they have maintained an industry-wide blacklist. Rather the record is consistent with the conclusion that each defendant acted individually non-conspiratorially and in a reasonable manner."

Contrary to Petitioners' assertion, the truth is that at this early stage nothing has been proven. The facts are all in sharp dispute and the issues which Petitioners assume they have proven remain to be resolved at the trial.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction

The interlocutory nature of the order denying a preliminary injunction precludes review by this Court in the absence of exceptional circumstances, not present here. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133; *American Const. Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384.

Further, it should be noted that Petitioners do not seriously challenge the other grounds held by the Court to preclude the relief sought.* These include: (a) laches; (b) lack of irreparable injury; (c) the existence of an adequate remedy at law; and (d) the lack of a reasonable certainty that Petitioners would ultimately prevail. The existence of these factors also serves as a bar to injunctive relief.

I

THE SUBSTANTIVE ISSUE OF REASONABLENESS DOES NOT ARISE UPON THIS RECORD.

The only substantive issue of law which Petitioners seek to raise at this time is whether reasonableness is a defense to an alleged concerted refusal to deal (Petition, pp. 16-18). The issue, however, does not arise upon this record. No concerted refusal to deal has been shown. Petitioners' allegations in this respect have been vigorously denied by the Respondents and found without support in the record by the District Court.

Petitioners cannot simply assume the existence of a conspiracy, contrary to the facts and the record and the Findings below. On the conspiracy issue, and on all the other controverted issues, Respondents are entitled to their day in court. This Court has just recently warned that summary procedures should be used sparingly in complex antitrust litigation, and that "Trial by affidavit is no substitute for trial by jury which so long has been a hallmark of 'even

*The only attention which Petitioners pay to these grounds is to make again an unfounded assumption (Petition, p. 22) that the Court of Appeals "apparently" decided the case in the light of the facts existing as of the date the action was commenced. Nothing in the record supports this assumption.

handed justice". *Poller v. Columbia Broadcasting*, 368 U. S. 464, 473. See *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 142.

Unless and until the Petitioners can prove and not merely allege a conspiracy, there is no reason for this Court to consider, in the abstract, this or any of the other many legal issues which may arise in the course of anti-trust litigation. Accordingly, consideration of the substantive question sought to be raised at this time would be unwarranted.

II

PETITIONERS' CLAIMS REGARDING THE FINDINGS OF FACT ARE LACKING IN MERIT.

Petitioners did not object to the Proposed Findings or the counter findings, although they had a month to do so. Nor did they move to amend the Findings once made. This but highlights the want of merit to the various claims now urged (Petition, Points II, III & IV) respecting the alleged manner in which the Findings were made.

On July 24, 1961, a docket entry was made in the District Court denying the Motion for a Preliminary Injunction and directing (J. A. 504) "(Orders to be presented)." Clearly this was not yet an appealable order. Cf. *U. S. v. Schaefer Brewing Co.*, 356 U. S. 227, 232-233; *United States v. Hark*, 320 U. S. 531. Petitioners' first Notice of Appeal, filed on July 28, 1961, was therefore premature, and the claim (Petition pp. 21, 24) that, thereafter, the Court was without jurisdiction to make the findings, frivolous.*

*Equally insubstantial is petitioners' attempt to create an issue from the statement in the Court of Appeals' opinion that the findings were made in accordance with "Fed. R. Civ. P. 52(b)" (Petition p. 19). Obviously, this is a typographical error. The Record is perfectly clear, as Petitioners are aware, that the Findings were made pursuant to Rule 52(a).

The question whether the Court of Appeals should have reviewed the Findings "uninhibited by the 'clearly erroneous' rule" (Petition p. 18) simply does not arise on this record. There is nothing to show that that Court's decision turned on the weight or deference (Petition, p. 16) accorded the Findings under that rule.

Rather, it appears that the Court of Appeals followed its normal practice, *Cox v. Democratic Central Committee*, 200 F. 2d 350 (D. C. Cir. 1952), and searched the record to determine whether there had been "clear error or abuse of discretion". It found none. To the contrary, it found that the District Court's action was "adequately based upon the record made"* (299 F. 2d at page 121). Thus, the issue which Petitioners seek to pose is not present in this record.

Even if the Court of Appeals' decision had hinged on the weight or deference to be given the Findings under the "clearly erroneous" rule, no substantial question could arise. Petitioners' criticisms of the Findings, based on the manner in which they were allegedly made, are captious. Basic to these criticisms is the claim that the Findings were not those of the District Court since they were drafted by prevailing counsel (Petition, pp. 18-20, 24). This contention is baseless. *U. S. v. Crescent Amusement Co.*, 323 U. S. 173; *Schilling v. Schaitzer-Cummins Co.*, 142 F. 2d 82 (D. C. Cir. 1944). The test is not who prepared the Findings, but rather, whether they are supported by the evidence. As this Court said in the *Crescent* case at pages 184-185:

*The frivolous nature of these criticisms is demonstrated by the repeated contention that the District Judge could not "check" the Proposed Findings (Petition pp. 18, 24) since the record was in the Court of Appeals. If this were a problem, it was created by Petitioners' premature appeal. The fact is, of course, that the record was as available to the District Judge and his staff in the Court of Appeals as it was in the files of the District Court. Furthermore, the Proposed Findings were presumably checked by Petitioners who filed no objections or counter-findings thereto.

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See United States v. Forness (CCA 2d) 125 F. (2) 928, 942-943. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are."

Here the Court of Appeals found the action of the District Court to be "adequately based on the record made" (209 F. 2d at page 121). Under the rule of *Crescent, supra*, this was the review required.

The fact is that the same test is applied to findings "whether the Court prepared them or adopted those submitted by counsel. The court's adoption of appellee's findings does not impeach or discredit them. We accord them full weight." *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F. 2d 355, 356 (5th Cir. 1961), *cert. denied*, 368 U. S. 833.

Petitioners' efforts to show a conflict among the Circuits, in this area, are fruitless. We have previously shown that the question of review "uninhibited by the 'clearly erroneous' rule" does not arise here and, therefore, an alleged conflict in regard thereto among other Circuits is of no moment. In point of fact, examination of the cases cited (Petition, p. 19) reveals that no conflict actually exists. Thus, in *Tanker Hyarade, No. 24* v. *The Dynamic*, 213 F. 2d 453 (2nd Cir. 1954), and *Mesle* v. *Key Steamship Corporation*, 260 F. 2d 747 (3rd Cir. 1958), *cert. denied*, 359 U. S. 966, the Second and Third Circuits actually applied the "clearly erroneous" rule. As to the Fourth Circuit, see *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719, 724 (4th Cir. 1961), which follows the *Crescent Amusement* case, *supra*.

On this interlocutory order denying a preliminary injunction, Petitioners received the review to which they were entitled. Accordingly, no substantial question, conflict of decisions or occasion for the exercise of this Court's supervisory power arises.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted.

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October Term, 1961

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Petitioners,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, ET AL.,

Respondents.

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Preliminary Statement

To avoid certiorari on the substantive issue set forth in Question 1 of Petitioners' Statement of Questions Presented (Pet. 2), respondents assert that the "undisputed facts" upon which petitioners rely consist of such things as old newspaper articles, an unissued press release, unauthenticated letters, and a transcript of a news telecast (Res. Br. 4-5). The record references set forth in the Petition (Pet. 5-11) demonstrate that, except for the press release obtained from the AMPP's files (Pet. 10), this assertion is false.

Respondents make a similar attempt to dilute the undisputed facts concerning the "employment controls" provisions of their respective distribution-financing agree-

ments (Res. Br. 5). The existence of such "controls" was expressly conceded by respondents' counsel during argument before the District Court.[1]

I

Respondents would have this Court deny certiorari on Question 1 (Pet. 2), not because it is unimportant or undeserving of consideration, but because, as respondents allege, that issue does not arise on this record (Res. Br. 7-8). We made it clear, however, that the Court of Appeals' failure to come to grips with this problem "resulted directly from the deference it paid to the District Court's 'findings'" (Pet. 16), and that, on this record, its failure to do so required review by this Court (Pet. 21-23).

If the District Court's "finding" on the issue of "concert" (No. 10, J.A. 567-568) is to be given any credence at all, it must be construed, if possible, as being consistent with the undisputed facts of record (Pet. 5-11). Otherwise, as we pointed out (Pet. 21), it would be "clearly erroneous." Construed in this light, the District Court's finding "that each defendant acted individually non-conspiratorially and

[1] Respondents' counsel stated: "[I]t is true that when a motion picture company finances an independent producer in the making of a picture, there is a contractual relationship. Sometimes a company like Paramount would invest $4 million in a movie. That movie will be made by an independent producer. Now, in the contract, Paramount certainly has a right to provide that it shall have a veto power on the people who are employed because it is investing its money in that picture and if it turns out that a person who is employed in that picture is harmful to the picture, it means Paramount would endanger the money that it has invested in it. But that is all a private contractual matter; there is no concert of action at all. * * * Would it mean that if Twentieth Century-Fox invests $4 million with an independent producer to produce a picture that it could have nothing to say about who is going to work on that picture? If that were the case, it would be very difficult for these independents to get financing. That is the way the financing is done in a lot of these pictures these days" (J.A. 561-562).

in a reasonable manner" (J.A. 568) means that the District Court found that respondents' joint policy of November 4, 1960 (Ex. 31; J.A. 233), which left each respondent free to determine how it should be applied, was individual, not concerted, action.[2] This is a question of law. Even assuming that the November 4, 1960 policy is not concerted action as between respondents at the *producer* level, when that policy and respondents' distribution-financing agreements with independent producers are read together (Pet. 11, ftn. 15), each respondent, whether acting independently or in concert with any other respondent at the *distributor* level, is actually restraining competition between all "independents" on the producer level who finance and distribute through that respondent. This is concerted action and illegal, *per se*. *Radiant Burners* v. *Peoples Gas & Coke Co.*, 364 U. S. 656 (1961).

The court below ignored this rule and did not reach the question of "reasonableness" because of its reliance on the District Court's subsidiary findings,[3] *i.e.*, findings wholly unresponsive to the factual situation existing as of the date of the "hearing" before the District Court (Pet. 21-22). Because of the nature of this error, Question 1 presents "a question of law, namely whether the [courts below] applied the proper standard to essentially undisputed facts." *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). This issue was fully briefed and argued below (Br. 23-31; Rep. Br. 16-17) and is squarely presented by Question 1 of Petitioners' Statement of Questions Presented (Pet. 2). Rule 23(1)(c) of the Rules of this Court provides that the "statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

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[2] See the treatment of this issue by the District Court on petitioners' motion under Rule 30(b) of the Federal Rules of Civil Procedure (28 FRD 2, 6; J.A. 516(14)).

[3] Findings 12, 13 and 14 (J.A. 568-569).

II

Respondents seek to defeat certiorari on the "findings" issue raised by Question 3(b) (Pet., 3) on the ground that the District Court's July 24, 1961 order (J.A. 564) was non-appealable and that petitioners' first Notice of Appeal, filed July 28, 1961 (J.A. 565) was, therefore, premature (Res. Br., 8-9).[3] While there is substantial question as to whether or not the action of the District Court on July 24, 1961 was appealable under 28 U. S. C. § 1292(a)(1)[4] respondents made no motion to dismiss the appeal in No. 16,523 and the Court of Appeals believed that the July 24, 1961 order (J.A. 564) was appealable. The court said: "We have before us consolidated appeals from *orders* of the United States District Court for the District of Columbia denying appellants' motion for preliminary injunction." (Pet. App. A, 27) (emphasis supplied). Had it believed otherwise, it would have dismissed the appeal in No. 16,523 on its own motion. *Trivette* v. *New York Life Ins. Co.* (6 Cir.), 270 F. 2d 198, 199. Accordingly, once a Notice of Appeal was filed on July 28, 1961 in Appeal No. 16,523, the District Court had no jurisdiction thereafter to entertain a motion under Rule 52(b). 5 Moore's *Federal Practice*, 2683-2684; 7 Moore's *Federal Practice*, 3158-3160, and cases cited.

Respondents assert that the record "is perfectly clear" that the District Court's findings were made in accordance with Rule 52(a) and that the opinion below, which stated that these findings were made in accordance with Rule 52 (b) was, obviously, "a typographical error" (Res. Br. 8, ftn.). Surely, since this very "error" was specifically called to the attention of the court below in the petition for re-hearing *en banc* (Pet. 15), it is reasonable to assume

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[4] Compare *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, 232-236 (1958) and *Bowles* v. *Rice* (6 Cir.), 152 F. 2d 543, 544.

that the petition would have been granted if only to correct it. Since the petition was denied (R. 605), it is plain that the Court of Appeals did not consider its holding on this issue to be an error—typographical or otherwise.

Conclusion

The courts below failed to apply proper legal standards to essentially undisputed facts and thereby frustrated private enforcement of the antitrust laws. Because of this, petitioners' ability to carry on this litigation has been effectively undermined with the result that, unless this Court acts now, consideration of the merits may be foreclosed.

In the courts below, petitioners' counsel stated during argument that if a preliminary injunction was refused, petitioners' complaint should be dismissed:

> "If the injunction is denied * * * and the * * * plaintiffs who are writers are once more excluded from this industry and if the Court does not issue an order from which I may effectively appeal, the defendants will have won their case. Now, they will have won it not on the merits; they will have won it simply because the plaintiffs will be unable financially to carry it on." (J.A. 555(1)).

The courts below ignored this plea and thereby side-stepped any consideration of the merits. This is in marked contrast to the recent attitude expressed by a majority of the court below in *Freeman* v. *Armour & Co.*, No. 952, this term.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

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